BEFORE THE TENNESSEE STATE DEPARTMENT OF EDUCATION

Z. D.,	)	
Petitioner,	)	**No. 99-59**
vs.	)	**A. JAMES ANDREWS**
	)	**Administrative Law Judge**
HAMILTON COUNTY DEPARTMENT	)	
OF EDUCATION,	)	
Respondent.	)	

MEMORANDUM OPINION AND FINAL ORDER

INTRODUCTION

Z. D. is a seven-year-old boy with highly motivated college educated parents. The student's parents became concerned when he appeared slow in developing speech at eighteen months of age. At his two-year checkup, the student's pediatrician reassured his parents and suggested they revisit the issue if had not begun speaking within the next six months. Around this time, a relative suggested the possibility that the student might be autistic and the parents of the student began to research the subject of autism on their own.

A colleague of the student's father referred them to both a Chattanooga child psychologist, Dr. Susan Speraw, and to the Chattanooga Speech and Hearing Center. The student was tested and found to be significantly delayed in speech and language development. Because the student had not yet reached his third birthday, the parents were referred to the Tennessee Early Intervention System ("TEIS") for early childhood services. Under a TEIS developed plan, the student received speech and language therapy as well as some in-home services.

The student's mother agreed to a referral to the Hamilton County Department of Education ("HCDE") in February, 1997, and first met with a HCDE representative in May of 1997. The HCDE

and the parents developed the first Individualized Educational Plan (IEP) for the student right after his third birthday. Under the terms of the student's initial IEP, and a second one prepared in October, 1997, the student attended the Ooletewah Elementary School (OES) where he was assigned to a class with other developmentally delayed children.

It was during this initial assignment to OES that the parents learned about the Lovaas style applied behavioral analysis ("ABA") intervention and its purported extraordinary results for young children afflicted with autism. On their own, they began implementing a Lovaas style program to teach the student at home. They selected a program developed by the Center for Autism and Related Disorders ("CARD"). The CARD program is patterned after a methodology developed and tested with autistic children by Dr. Ivar Lovaas at the University of California at Los Angeles. The methodology employs intensive one-on-one instruction in a format known as mass discreet trials ABA. It relies heavily on extremely structured teaching and comprehensive data collection and analysis.

Dr. Lovaas tested this approach to teaching autistic children in the 1980's and evaluated the results by comparing the gains in IQ and performance of the children who received this intensive one-on-one ABA instruction with a control group of children who received the normal interventions offered by their local school systems. Dr. Lovaas published the results of his experiment in 1987 and, for the best outcome students, he reported dramatic gains in IQ and in their ability to function within the regular education setting.

Virtually all students in the Lovaas study group showed significant improvement in their disabling condition. A follow up study published by another researcher in 1993 found that 47% of the students who had received the ABA intervention went on to become "indistinguishable" in their

regular education classrooms.[1]

The parents and Dr. Speraw were convinced that the student was making exceptional progress because of the ABA program they were funding in their home. In a May, 1998 IEP meeting, the parents asked that the Lovaas style ABA be included in the student's summer services program and that HCDE pay for those services. This request for payment came after the parents had observed the student's progress in the system they were funding and providing in their home. When HCDE refused the request for Lovaas style ABA for the student, the parents asked for data supporting the efficacy of the HCDE approach to teaching autistic children. These types of data were never provided to the parents.

The HCDE has never funded an intensive Lovaas style ABA program and the HCDE had no evaluation data, self-generated or otherwise, on the effectiveness of its preferred approach for teaching autistic children. Notwithstanding the fact that it had virtually no scientific data to support

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[1]In the intervening years, the educational community has engaged in an ongoing battle over the efficacy of the Lovaas style intervention. Criticism has come from virtually every direction; yet, it remains the most comprehensive scientific analysis of a methodology for teaching autistic children to date.

Contemporaneously with this hearing, the educators conducting the research at the federally funded replication sites for the Lovaas ABA methodology began to publish preliminary results. Some of these preliminary data were introduced as exhibits to this hearing. The preliminary evidence presented at the hearing indicated that the later tests of the Lovaas methodology were achieving similar results.

the services it offered the parents for the student, HCDE rejected the Lovaas based methodology in large part because HCDE believed there was insufficient scientific proof for that particular methodology. The Lovaas style ABA also contradicts, at least in its initial application, twenty-five years of special education philosophy and experience by eschewing the mainstream/inclusion goal for the young autistic child in favor of intensive one-on-one learning in a non-distracting environment. It is also more expensive than traditional and more widely used approaches for teaching autistic children.

The parents rejected the IEP for 1999-2000 because it did not offer Lovaas style ABA services and because they felt it did not provide sufficient opportunity for the student to be educated with typically developing peers. After rejecting the 1999-2000 IEP, the parents enrolled the student in a private preschool, the Primrose School, and on September 16, 1999 requested this due process hearing.

The student performed well at the Primrose School and continued to make significant progress in his ABA sessions. During the course of this hearing, the parents amended their original request and added complaints alleging the HCDE violated the IDEA by denying the student related services and his ABA program over the course of the summer.

The due process hearing in this matter was initiated by an eighteen page request following, among other things, the HCDE's refusal to include intensive Lovaas style ABA program in the student's IEP for the 1999-2000 school year. After extensive pretrial discovery, litigation, and procedural wrangling, the hearing began on March 15, 2000. The student's attorneys presented a comprehensive and detailed argument for the Lovaas style ABA methodology and its positive impact on the student. The HCDE presented an equally thorough case in defense of the interventions it

offered for the student. Neither side left a stone unturned or un-thrown in attacking the efficacy of the educational approach advocated by the other side.

The hearing began on March 15, 2000 and concluded on February 13, 2001. Because of the voluminous record, the court allowed counsel ample time to prepare their lengthy post- trial briefs and reply briefs. During the twenty-seven full days of testimony, the court heard twenty different fact and expert witnesses testify on virtually all aspects of the student's disability, his various educational placements, the progress he has or has not made, and the efficacy of the educational methodologies and related services he has and has not received or accessed.[2]

In addition to observing witnesses and listening to testimony, the court has reviewed tens of thousands of pages of exhibits and several videotapes. Finally, the court, at the insistence of the HCDE and after the testimony was concluded, personally observed the student (1) in his regular education class, (2) at a "pull out" speech therapy session at his school, (3) at a recess session playing with his classmates. (4) at a second speech therapy session with his private speech therapist, and (5) participating in a Lovaas style ABA therapy session in his home.

The court cannot imagine a more complete record upon which to base its findings.

1. WITNESS CREDIBILITY

Often the finder of fact, be it a jury or an administrative law judge, has to form opinions as to credibility on precious little information. Because of the detailed examinations and cross-examinations by opposing counsel, however, the court had an opportunity to observe the

[2]The parents continued to provide the student with the home based Lovaas style ABA program they said they would provide for him regardless of the outcome of the due process hearing. Both parties waived the 45-day requirement for a due process decision and both parties agreed that the issues deserved a full and fair hearing and a complete record upon which to base a

important witnesses at great length and is quite confident in assigning weight to their testimony.

After viewing their demeanor, responsiveness, and whether or not witnesses were forthright in their answers as opposed to evasive or combative, the court makes the following findings as to witness credibility and the weight to be given to particular testimony:

1. The court finds **Dr. Susan Speraw** credible.

2. The court finds **Dr. James A. Mulick** credible and well versed by virtue of both education and experience in the various methodologies available to address the needs of autistic children.

3. The court finds **Irise Chapman**, the Director of Exceptional Education for the HCDE, credible.

4. The court finds **Dr. Ilene Schwartz**, an expert on autism and methodologies applicable to the treatment of autism, to be credible and gives great weight to her testimony. Although Dr. Schwartz was produced as an expert on behalf of the HCDE, her testimony was balanced and well supported by her education and experience and rang true in all respects. Dr. Schwartz testified knowingly about the history. theory, and current practice in Lovaas style ABA. Tr. 6650-53. Her open mind and obvious commitment to furthering the knowledge base for educating autistic children made her a compelling witness.

5. The court finds **Mr. Keith Amerson**, an employee of and advocate for the Center for Autism and Related Disorders, credible.

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decision. Thus the lengthy hearing had little or no practical effect on the student's education.

6. The court finds **Ms. Julie Reyes**, a pre-school teacher in the private Primrose School credible.

7. The court gave reduced weight to **Ms. Jane Dixon's** testimony. In part, this is because Ms. Dixon steadfastly maintained she had an open mind when it came to considering which methodology would be appropriate for the student when the record clearly demonstrated she had a preconceived and unwavering position as someone opposed to Lovaas style ABA in any form. *See, e.g.*, Davenport at Tr. 1008-12. Ms. Dixon also maintained that she had never told the parents that cost was a factor involved in HCDE's decision to deny Lovaas style ABA to the student even though the parents produced a tape recording of a meeting they had with Ms. Dixon in which Ms. Dixon clearly announces that cost is a factor. Tr. 2436-37.

8. The court finds **Lisa Steele**, an experienced special education teacher with HCDE, a credible witness.

9. The court does not credit the testimony of **Paula Wiessen**, an experienced speech and language pathologist and preschool CDC teacher with HCDE. *See e.g.*, Tr. 1557, wherein Ms. Wiessen equates sitting in the vicinity of typically developing children with interaction and Tr. 1558, 1787, 1791 wherein she evades straightforward questions. In particular, the court finds that when she stated that she could not possibly have said whether or not the student needed summer services it was an untruthful answer. Tr. 1569-70. The record demonstrates clearly that she had sufficient training, education, and first-hand experience with the student to have made a recommendation one way or the other.

10. The court gives little weight to the testimony of **Ann Kennedy**, a specialist in special education with HCDE who became an educational diagnostician and consultant for autism for the HCDE during the course of the hearing. In part, this is because Ms. Kennedy demonstrated a closed mind and steadfast adherence to preconceived notions. *See, e.g.*, Tr. 1811, wherein she testifies that she believes intense instruction is itself aversive for autistic children and Tr. 1821-25 and Tr. 1884-1889, wherein she constructed her own "experiment" to evaluate Lovaas style ABA. The experiment consisted of two hours per week of what she *believed* ABA therapy would look like despite the fact that the Lovaas report found anything less that ten hours per week showed no effects whatsoever. Also, during her testimony in November of 2000, Ms. Kennedy, testifying as a HCDE autism expert, showed an appalling lack of knowledge or interest in the results of the Lovaas replication studies. Tr. 5492.

11. The court finds **Sandra Jerardi**, a lead teacher for HCDE, to have been both evasive and confrontational in her answers. *See, e.g.* Tr. 2249, 2165, 2349, 2350, 2574. In addition, many of her answers lacked credibility. *See, e.g.*, Tr. 2352, 2611, and 2168, wherein her answer as to why she referred to this matter as a sensitive case lacked credibility and Tr. 2176-81, wherein she excuses obvious flaws in a study which purports to validate methods of which she approves. Additionally, Ms. Jerardi testified that the student did not need a twelve month IEP because he was making such good progress (Tr. 2917) and then contradicted herself a few moments later when she testified that she had not seen any results that would cause her to seriously consider Lovaas style ABA services for the student (Tr. 2943). She also testified that once a methodology is working for a child it would be inappropriate to change methodologies, yet, she continues to refuse even to consider Lovaas style ABA for

the student despite the fact that it has been demonstrated to be effective for him. *Id.*

12. The court finds **Lisa Holder** credible.

13. The court finds **Tamilla Burt** credible.

14. The court finds **P. D.,** the student's father, credible.

15. The court finds **M. D.,** the student's mother, credible.

16. The court finds **Donna Palmer**, a HCDE school psychologist, credible.

17. The court finds **Judy Bailey**, a behavior analyst and the Associate Director of Professional Support Services with the TEAM Evaluation Center, credible.

18. The court finds **Tracey Lynn Ford**, the mother of an autistic child who had received HCDE services, credible.

19. The court finds **Jan Marie Lewis**, a speech and language service provider for HCDE, to be credible.

20. The court finds **Scott Hooper** a school psychologist with HCDE not credible. When he testified, Mr. Hooper demonstrated that he would go to any length to testify favorably for HCDE. He often took very strong positions favorable to the HCDE in areas and on subjects where he had little or no knowledge or expertise. For example, he enthusiastically criticized the Lovaas style ABA even though he had never taken the time to observe a complete session; Tr. 5851; or to review significant parts of the record in this case before he testified. Tr. 6024, Tr. 6034, Tr. 6040-41. *See also,* Tr. 5860, wherein Ms. Hooper touts an alternative to Lovaas style ABA when the alternative had no research foundation or support whatsoever. He did this while simultaneously criticizing the Lovaas methodology because of perceived flaws in the research study design.

II. FINDINGS OF FACT

Having weighed the credibility of witnesses and based on the record in this case. the court finds the following facts:

1. Z. D. was born in1994 and moved to Tennessee with his parents when he was 18 months old. Tr. 1247-48.
2. At 2 years of age his parents. Mr. and Mrs. D.. discussed their concern that the student could not speak with their pediatrician. Tr. 1247-48.
3. At this same period of time. his mother became concerned that he might be autistic and began seeking out information on that condition. Tr. 1249.
4. Mr. D. also sought help and was referred to Dr. Susan Speraw. Tr.1252
5. Dr. Speraw has a Ph.D. in Clinical Psychology and has taught developmental psychology at the University of Tennessee College of Medicine. Tr. 42, 46.
6. Dr. Speraw was qualified and accepted by the Hamilton County Department of Education (HCDE) as an expert in developmental pediatrics, psycho-educational testing, autism, and appropriate intervention for autistic children. Tr. 75.
7. Autism is a neurological disorder that impacts a child's ability to communicate, to process information, to from social relationships. and to interact with the world. Tr. 54.
8. Autistic children need intensive instruction to learn things that for most people seem to be second nature. Tr. 57.
9. Until the last ten to fifteen years. the traditional view of autism had been that. barring mis-diagnosis or unknown factors, an autistic child would remain mentally retarded or cognitively limited for life. Tr. 436.
10. The student's parents had their son evaluated at the Chattanooga Speech and Hearing Center on February 4, 1997. T. 1252; Ex. 2.
11. The Chattanooga Speech and Hearing Center found the student to be delayed from 22-25 months in developing his speech and language and referred the parents to the Tennessee Early Intervention System (TEIS). Tr. 1252-54.
12. TEIS provides services for special needs children who have not yet reached the age of

eligibility for services from their local public school system. Id.

13. Although the parents do not remember receiving a copy, the student was also the subject of a physical therapy evaluation during this same period of time. Tr. 1254-55, 3917.

14. The physical therapy evaluation noted "toe walking" but was otherwise unremarkable. Tr. 1255.

15. The parents also had Dr. Speraw complete a psychological evaluation of the student. Tr. 118, 1256.

16. Dr. Speraw could not test the student's intelligence because he had not developed to the two-year level. Tr. 115.

17. Mr. Jason Palmer of TEIS then prepared an initial plan for dealing with the student's deficits. Ex. 3.

18. Based on Mr. Palmer's recommendation, the parents toured the Siskin Center, a facility serving special needs children. Tr. 1257-58.

19. Mrs. D. found the Siskin Center to be chaotic and devoid of typically developed preschool children. Tr. 1258-59.

20. The parents decided on an Individualized Family Service Plan prepared in consultation with TEIS. Tr. 1259-60.

21. The in-home teacher provided by TEIS, made 35 visits to the parent's home prior to the student's third birthday. Tr. 4255-56; Ex. 300.

22. The IFSP prepared by TEIS did not recommend a formal occupational or physical therapy assessment. Ex. 7; Tr. 4255.

23. On February 20, 1997, Mrs. D. gave TEIS permission to refer the student to HCDE. Tr. 1264-65; Ex. 300.

24. Ms. Jane Dixon, an HCDE Special Education Supervisor, met with the student's mother on May 19, 1997 and at the meeting she discussed programs available for autistic children without mentioning the Lovaas style ABA as a methodology for the parents to explore. Tr. 3444..

25. At the time of the May 19, 1997 meeting, TEIS had not forwarded its information to HCDE and HCDE had not taken affirmative steps to obtain it. Tr. 1269.

26. HCDE arranged for an initial assessment of the student in June. 1997. Tr. 1272.

27. A number of assessments input documents were prepared in June, 1997. Exs. 15-19, Exs. 21-22.

28. HCDE scheduled an Individualized Education Plan (IEP) Team meeting for July 30, 1997. Ex. 24.

29. HCDE and the student's parents completed an initial IEP for the student on July 30, 1997. Tr. 1276; Ex. 29.

30. A regular education teacher did not participate in the July 30, 1997 IEP Team meeting. Tr. 3464.

31. Z. D. presented as essentially nonverbal in August of 1997. Tr. 3530.

32. Z. D. presented with some self-stimulation behaviors routinely observed in autistic children such as hand flapping and toe walking.

33. The initial IEP was approved by the parents and called for a thirty day assessment of the student at Ooletewah Elementary School (OES) and called for the student to receive two forty-five minute sessions of individual speech therapy per week during the thirty day assessment period. Ex. 29; Tr. 1271, 1277.

34. During the 30-day assessment period, the student attended school from 8:30 a.m. until 3:00 p.m. five days a week. Ex. 29.

35. On October 24, 1997 the IEP was revised to include three fifteen-minute sessions each day of speech therapy. Exs. 35-38.

36. Ms. Wiessen, the speech therapist provided by HCDE for the 1997-98 school year, kept poor records and lost many of the records she did make in a move. Tr. 1506-07.

37. In August, 1997, the student was placed in a Comprehensive Development Class (CDC) at OES. Tr. 1292-93.

38. In August of 1997, the parents learned about and began exploring Lovaas style ABA as an appropriate methodology for addressing the student's special needs. Tr. 3453.

39. Dr. Speraw wrote a letter on October 13, 1997, recommending that the student receive intensive one-on-one Applied Behavior Analysis (ABA) training. Ex. 34.

40. Lisa Steele was the student's teacher in the CDC class at OES for the 1997-98 school year

and the student's parents had great confidence in Ms. Steele. Tr. 1293, 3447.

41. The IEP Team felt that the student would receive additional support in a CDC class. Ex. 29.

42. The CDC class contained only special needs children and did not include any typically developing children/peers. Tr. 1292-93.

43. The CDC class included children, who were developmentally delayed, mentally retarded, language impaired, health impaired, and autistic. Ex. 483; Tr. 3629.

44. The student was the least verbal child in the CDC class at OES. Tr. 1323.

45. Lisa Steele communicated with the student's parents through daily notes. Ex. 448.

46. The student routinely joined in the activities with the other children in the CDC class. Tr. 1428-35.

47. The student attended the CDC class five days a week until March when an M-Team reduced his program to three days a week and his parents expanded his Lovaas style ABA program at home. Tr. 1337-38, 1438-41; Ex. 42.

48. Z. D. had no significant interaction with typically developing peers while he was assigned to the CDC class at OES. Tr. 1311.

49. A significant percentage of the children in the CDC class modeled inappropriate behaviors. Tr. 1548-50.

50. On March 18, 1998, an M-Team recommended reducing the student's hours of attendance at OES to Monday and Wednesday for half of a day and on Friday so that the student could devote time to his home Lovaas style ABA program. Tr. 1337-38; Ex. 42.

51. The parents had Dr. Speraw conduct a second psychological evaluation of the student in April, 1998. Ex. 130.

52. On April 28, 1998, an M-Team reviewed the student's program and began preparing the IEP for the 1998-99 school year. Tr. 1403; Exs. 48, 50.

53. On May 11, 1998, an M-Team meeting was convened which considered Extended School Year Services for the student. Tr. 1403-04; Ex. 56.

54. The parents and HCDE fact and expert witnesses agreed that the student is likely to regress over the summer months if he does not continue to receive special education

services. Tr. 516-17; Tr. 1001; Tr. 5758-59; Tr. 2823; Tr. 6808. The court finds that the student is likely to regress during the summer months unless he receives special education services.

55. At the May 11, 1998. meeting the student's parents presented the results of their home based ABA program to HCDE personnel and asked that HCDE fund the program. Tr. 1457; Ex. 56.

56. At the May 11, 1998 IEP meeting, Sandra Jerardi told the parents that there were certain things she would like to give (the student) but that she could not because she could not give the same service to everybody. Tr. 2951.

57. The parents agreed with the ESY program for the summer of 1998. Ex. 66.

58. In May of 1998, the student's parents requested data on the efficacy of the HCDE program for autistic children but were never provided with any such data. Tr. 3803.

59. The summer program for the student for the summer of 1998 did not include Lovaas style ABA services. Ex. 66.

60. Prior to the parent's request that HCDE pay for the student's ABA program, HCDE personnel were complimentary of the student's progress with ABA. Tr. 3681.

61. No HCDE personnel ever discussed with Lisa Steele the student being assigned to a regular education classroom. Tr. 1485.

62. Summer services were appropriate for the student for the summer of 1998. Tr. 1344-45.

63. The HCDE has consistently rejected providing Lovaas style ABA services to the student or any other student in their system. The school system primarily hinges its steadfast refusal to even consider this methodology on its belief that Lovaas style ABA has not been scientifically proven to be effective. Tr. 1271:

64. Lovaas style ABA is an organized systematic approach to teaching based on operant conditioning and requires the systematic collection of data on the child's acquisition of discreet skills. Speraw at Tr. 235.

65. Lovaas style ABA seeks to understand behavior, predict behavior and the direction it will change, and control the change in behavior. Tr. 436.

66. Lovaas style ABA teaches autistic children how to organize information in their

environment. Speraw at 236.

67. Dr. Ivar Lovaas of UCLA conducted an intervention in the 1980's that included intensive, one-on-one discreet trials in an ABA format for an experimental group of preschool children diagnosed with autism and compared the results to a control group which did not receive the intensive ABA intervention. Ex. 63.

68. Virtually all children made significant progressed within Lovaas' experimental group and recorded IQ gains. The 47 percent termed "best outcome" achieved dramatic IQ gains and were later described in a follow-up report done in 1993 as "indistinguishable" in the regular education setting. Ex. 63.

69. The Lovaas style ABA methodology relies on intensive one-on-one early intervention, and the earlier the better. Tr. 410.

70. Children with testable IQs below 35 and children with multiple handicapping conditions are much less likely to achieve positive outcomes from a Lovaas style ABA intervention. Tr. 532.

71. The Surgeon General of the United States has endorsed the Lovaas style ABA methodology as a promising intervention for autistic children. Ex. 473.

72. There are no similar studies or even outcome reports for any other methodology including the "eclectic" model employed by HCDE. Tr. 456.

73. There are no studies that indicate that school systems can blend various methodologies or approaches to teaching autistic children and achieve the same kind of results reported by Dr. Lovaas in his 1987 publication . Speraw at Tr. 114-15.

74. Dr. Speraw had seen significant progress in children with autism who had received an intensive ABA intervention. Tr. 120.

75. The evidence shows that Lovaas style interventions of ten hours per week or less have no effect. Tr. 520:

76. Following the 1987 publication of the Lovaas program and results, the same type of progress was observed for children in Northern California who had received Lovaas style ABA versus little or no progress in children who had received more standard interventions. Tr. 473.

77. Similar results were also reported by Dr. Sven Eikeseth. Ex. 317.

78. The federal government has funded replication sites to test the validity of Lovaas reported results. Tr. 460-61; Tr. 643-44; Ex. 316.

79. The results from one such site, the Wisconsin Young Autism Project, appear to replicate the original Lovaas findings. Ex. 316, Tr. 642.

80. There is no study in the field of autism more reliable than the Lovaas study and its progeny. Tr. 5121.

81. Dr. Lovaas' study is the most rigorous study in the field of autism interventions to date. *See, e.g.*, testimony of Dr. Ilene Schwartz, an HCDE expert witness on methodologies for treating autism at Tr. 6693-94.

82. The data to date indicate that a Lovaas program of between 20-40 hours per week is required to produce meaningful IQ boosts for autistic children. Tr. 471.

83. In May of 1999, the New York State Early Intervention Committee, after reviewing biological treatments and available educational methodologies for addressing the needs of autistic children, recommended Lovaas style ABA for young children diagnosed with autism. Tr. 644-47; Tr. 884-85; Ex. 324.

84. Lovaas style ABA is among the best practices available to teach children with autism. Tr. 6713, testimony of HCDE expert, Dr. Ilene Schwartz.

85. HCDE rejects the validity of the Lovaas study and its results and embraces the position of the professionals in the field who have published articles critical of the Lovaas style ABA approach to treating children with autism. See, e.g., Exs. 433, 435, 438, 439.

86. Autistic children who are placed in special education classrooms as opposed to being placed in classrooms with typically developing peers can learn unwanted behaviors from the other, and sometimes more challenged, special education students. Tr. 750.

87. The parents decided to fund a Lovaas style ABA home based program provided by the Center for Autistic and Related Disorders (CARD).

88. A system for teaching autistic children called TEACCH is a major methodology employed by school systems. Tr. 437.

89. TEACCH was developed at the University of North Carolina and is currently a statewide

program within North Carolina. Tr. 437.

90. TEACCH is a cradle to grave support system based on the assumption that the core clinical problems in autism are lifelong. Tr. 439.

91. TEACCH or major components of TEACCH are much more prevalent in HCDE and institutions with which it contracts (e.g., Signal Center, Siskin Center. TEAM Evaluation Center) than Lovaas Style ABA. Tr. 3434; 4957-58.

92. The HCDE does not have a methodology as such and instead relies on assembling components of other strategies/methodologies for educating autistic children.

93. TEACCH is a humane and effective methodology for addressing the needs of older autistic children and younger autistic children who have not shown or who are incapable of making the progress and IQ gains demonstrated by Lovaas style ABA. Tr. 649.

94. TEACCH is a less expensive methodology for a school system to implement than Lovaas style ABA. Tr. 4976.

95. TEACCH does not address some of the primary deficits of children with autism. Schwartz at Tr. 6707.

96. Dr. Mulick, who has seen and evaluated almost 2,000 children with autism, has only seen children who received intensive Lovaas style ABA become "indistinguishable" in the regular education setting. Tr. 657.

97. Dr. Speraw tested the student again on April 27, 1998 after he had received services from HCDE at OES and intensive ABA therapy provided by his parents. Tr. 122-23.

98. Although he became frustrated at times with the test, the student's IQ now tested at 93 which is in the average range. Tr. 126-27.

99. The HCDE held an IEP meeting on October 9, 1998 to continue developing an IEP for the student for the 1998-99 school year. Tr. 3656; Ex. 102.

100. The October 9, 1998 IEP meeting focused on creating an IEP for the 1998-99 school year. The student's parents suggested approximately 600 goals for the student and HCDE suggested 78 goals. Tr. 5150.

101. Another IEP meeting was held on October 15, 1998 to finalize an IEP for the 1998-99 school year. Exs. 99, 102, 105, 106.

102. The parents did not agree with the IEP approved by the IEP team for the 1998-99 school year and filed a minority report. Ex. 113.

103. There was eventual agreement between the HCDE and the parents on the goals and objectives for 1998-99 but disagreement on the student's need for intensive one-on-one ABA instruction. Tr. 4617; Ex. 113.

104. No regular education teacher attended the February 19, 1999 IEP meeting. Ex. 172.

105. Jane Dixon told the parents that they could not ask questions during the March 3, 1999 IEP meeting. Tr. 3766-68.

106. An M-Team considered the parent's request for summer services for the student for the summer of 1999 and denied any services. Ex. 211.

107. The student's parents also requested home based Lovaas style ABA for the student's summer program for the summer of 1999. Tr. 1461-62.

108. The HCDE suggested 78 goals for the student's 1998-99 IEP. Tr. 5150.

109. Of the 600 goals suggested by the student's parents for the 1998-99 school year. 137 were incorporated into the IEP and the student accomplished 99 of them. Tr. 5150.

110. The student also accomplished 130 of the goals HCDE refused to put into his 1998-99 IEP. Tr. 5150.

111. Ms. Dixon investigated the student's parents' dispute with the IEP and interviewed various teachers and providers without interviewing any of the ABA providers even though Lovaas style ABA formed the bulk of the student's educational program at that time. Tr. 2414-17.

112. HCDE denied the parent's request for Lovaas style ABA for the student in part because HCDE believes it is more expensive than HCDE's current approach. Tr. 2435-37.

113. Dr. Speraw again tested the student on June 2, 1999. The student had been receiving 28 hours of intensive one-on-one Lovaas style ABA intervention, two hours a week of speech therapy provided by his parents, and occupational therapy and other services at OES. Tr. 130-132.

114. Dr. Speraw observed a "joy of living" in the student in June of 1999 that had not been seen before. Tr. 313.

115. In June, 1999, the student was ready to go into a classroom with typically developing peers. Tr. 313.

116. On the June 2, 1999 evaluation the student's IQ was recorded at 105, 12 points higher than the previous year. Tr. 134.

117. Dr. Speraw also noted "tremendous progress" in the student's interpersonal skills and ability to reason. Tr. 138.

118. Dr. Speraw observed the student on March 9, 2000 at the Primrose School and found him to have made significant progress since her evaluation the previous June and saw him interacting appropriately with the non-disabled children in his 4K class environment. Tr. 176-180.

119. Dr. Speraw has observed at least 50 children who have received a variety of therapies/interventions, including children receiving only HCDE interventions, and has found the ABA approach to be the most effective. Tr. 314.

120. Lovaas style ABA may be cost effective over time by allowing a higher percentage of autistic children to become normal functioning productive adults. E. 311.

121. In addition to the challenge of autism, the student suffers from a physical condition known as verbal dyspraxia (sometimes called apraxia) which makes it difficult for him to vocalize. Tr. 98384.

122. CARD employs various sub-strategies for addressing autistic behavior, including discreet trials, prompting, shaping behaviors and responses, reinforcement, differential reinforcement, sequencing of events, and chaining. Tr. 771, 783.

123. CARD encourages socialization by focusing on increasing imitative skills, increasing the ability to follow instructions, and increasing play skills. Tr. 781.

124. The CARD ABA program is a complex, orderly, structured program and the student responds well to it. Tr. 3164-73.

125. When the parents were organizing and funding the student's Lovaas style ABA program during the 1997-98 regular school year, HCDE personnel had only positive things to say about the intensive ABA methodology. E.51, pp. 43, 45, 52, 53: E.58, p.61.

126. *Prior* to the parents requesting funding for the student's ABA program from the HCDE,

Ms. Sandra Jerardi authored an internal memo in which she described the student's program under IDEA as a "sensitive case with regards to school program and/or Lovaas."

127. Based on other testimony in the record supporting the proposition that the HCDE rejects meaningful consideration of the Lovaas style ABA intervention at least in large part because of its perceived cost, the court finds that Ms. Jerardi was flagging the student's education program as sensitive because of its probable cost and adverse impact on the HCDE policy of rejecting any and all requests for Lovaas style ABA for young autistic children.

128. At the May 11, 1998 IEP meeting, the parents outlined the impressive results the student had achieved with the Lovaas style ABA methodology and asked the HCDE to fund a continuation of the program over the summer. E.57; E.58, pp. 15, 29.

129. HCDE personnel informed the parents that "the powers that be" were not implementing ABA programs. E. 58, p. 36.

130. Ms. Jerardi, an HCDE representative and IEP team member in the May 11, 1998 IEP team meeting, told the parents that she wished people would pay their taxes so that HCDE could provide ABA for the student. E. 58, p. 79.

131. Jane Dixon told the parents that the cost of the ABA program is important and that cost was a factor in denying it. E. 150 at p. 21.

132. There was no regular education teacher *of the student's* at the October 15, 1998 IEP team meeting even though it was clear that whether or not it would be appropriate for the student to participate in the regular education setting would be a subject of the meeting.

133. The student progressed in his ability to function and socialize with other children while at the Primrose School. Tr. 902-925.

134. The student was academically one of the better students in Ms. Reyes preschool class at Primrose School. Tr. 908.

135. Anna Davenport, a licensed speech and language pathologist, provides speech therapy to autistic students whose deficits are being addressed by either Lovaas style ABA or TEACCH methodologies. Tr. 1027.

136. Anna Davenport finds that the autistic children who have been receiving Lovaas style

ABA intervention have better attention and compliance skills and that they learn better and faster than those receiving the TEACCH program. Tr. 1028.

137. Anna Davenport also has provided speech and language services to autistic children being served with the HCDE program and has found them to have slower progress than those receiving the Lovaas style ABA methodology. Tr. 1030.

138. The regular education teacher who attended the August 25, 1999, meeting left before the 1999-2000 goals and objectives were developed and before the issue of placement was decided. Exs. 253, 256, 259, 260, 265.

139. The student responds well to computerized speech augmentation devices. Tr. 1091.

140. The student also learns to communicate from other children who are in his environment. Tr. 1129-30.

141. A CARD trained tutor/aide, April Brewer, accompanied the student while he was at Primrose School. Tr. 1139-44.

142. The aide/tutor who accompanied him at Primrose School also provided the student with some of his home based Lovaas style ABA. Tr. 1144.

143. Tamilla Burt, one of the student's ABA tutors, had previously worked at a facility serving autistic children in Missouri. While at that facility, she noted that the children receiving Lovaas style ABA services were able to grasp material much more quickly than those who were not receiving those services. Tr. 3383-84.

144. Over the course of the student's program with home based ABA and attending school with typically developing peers at Primrose School, the student became less prompt dependent. Tr.1148.

145. The student also fit in well socially with his peers at Primrose School, tried to imitate their behaviors, and, as of April, 2000, some of the children at Primrose School worked to get the student to speak. Tr. 1152, 1158-60.

146. As of April, 2000, Ms. Brewer found that the student was "learning to learn" at a faster rate. Tr. 1257.

147. The student acquired new skills in proportion to the number of Lovaas style ABA hours he received. Tr. 3079.

148. Numerous HCDE witnesses accepted the accuracy of the data maintained by the parents and acknowledged that the parents never refused a request by HCDE for information about the student or his program. *See, e.g.*, e. 108, p.41 and E-103, p.26. The Court finds these data to be accurate.

149. HCDE personnel believe that, if the purported results of the initial Lovaas study could be proven and replicated, the Lovaas style ABA would be the appropriate methodology for preschool autistic children. *See e.g.*, Dixon at Tr. 2379, 2385.

150. Ms. Jane Dixon, a supervisor of special education for HCDE, has, as part of her job, a duty to identify better methodologies for teaching autistic children. Tr. 2524.

151. Ms. Dixon acknowledged that the initial results of the Wisconsin Early Autism Project were surprisingly good. Tr. 2521-23.

152. Despite the excellent reported results from the Wisconsin Project, Ms. Dixon has made no effort whatsoever to contact personnel administering that program. Tr. 2525.

153. If an autistic child has a chance of becoming indistinguishable, it would be inappropriate to set a lesser goal for that child. Dixon at Tr. 2555.

154. As of June, 2000, Sandra Jerardi was making educational decisions and recommendations for autistic children even though she had not read the report of the Wisconsin Early Autism Project, which had been made public in 1999, and had been a subject of this hearing for many months. Tr. 2602.

155. Twenty years ago there was no strategy available which educators thought would allow autistic children to function in the normal range or become indistinguishable from typically developed peers. Dixon at Tr. 2713

156. Jane Dixon believes that the parents' proposed goal to make the student independent in society with as normal a life as possible is unrealistic. Tr. 2716.

157. HCDE has a policy of not considering Lovaas style ABA for autistic children. Tr. 2941 and Tr. 2958-59 wherein Sandra Jerardi admits to being impressed by the student's present levels of performance yet steadfastly refuses to give any credit to the student's intensive Lovaas style ABA program for these achievements. *See, also,* Tr. 2966, wherein Ms. Jerardi refuses to concede that any progress is attributable to the ABA program even

when the progress was obtained over the course of a summer in which the school system provided no services.

158. In October, 1998, HCDE denied the parents' request for an assistive technology evaluation aimed at determining whether or not the student would benefit from an augmentative speech device. Tr. 2980-81.

159. At the May 24, 1999 IEP meeting, Ms. Wiessen, a HCDE speech and language pathologist, acknowledged that the student had emerging skills in speech and language. Tr. 3819. Nonetheless, Ms. Wiessen agreed with the decision to deny the student speech therapy during the summer of 1999. *Id.*

160. There was no regular education teacher in attendance at the August 20, 1999 IEP Team meeting. Tr. 3821.

161. In March of 2000, the student was doing very well with the ABA and classroom exposure he was receiving at that time. Tr. 889.

162. In March of 2000, the student had begun to make sounds on a regular basis and attempt to verbalize. Tr. 958.

163. In June of 2000, the student's IQ had increased by 26 points over his previous test score. Ex. 487.

164. The rate at which the student has been able to acquire new skills has improved greatly between 1997 and 2000. Tr. 4211-14.

165. The complexity of the skills being acquired has also increased. Tr. 4225.

166. In August of 2000, an IEP was developed providing services for the student at Westview Elementary School. Exs. 501 505.

167. On May 17, 2000, an assessment team convened by HCDE recommended certain assessments/evaluations for Z. D. Exs. 494, 510.

168. On August 11, 2000, an IEP team developed an extensive IEP for the student, which called for him, among other things, to attend school at Westview Elementary School and to be assigned to a regular education class. Exs. 501 and 502.

169. While the parents agreed with the placement at Westview, they continued to maintain that in order for the student to receive a FAPE, the school system would have to offer the

student a Lovaas style ABA program. Ex. 504.

170. The student attended Westview Elementary School in the morning on a part-time basis during the 2000-01 school year and participated in a home based Lovaas style ABA program and parent provided speech therapy in the afternoons.

171. Between when the student first began ABA in 1997 and the end of 2000, the student averaged 24-26 hours per week of Lovaas style ABA interventions.

172. The student seems to do best at around 30 hours of ABA per week. Tr. 4227.

173. The student's greatest gains occurred during periods when he received no services from HCDE. Tr. 3877; Ex. 487. In fact, it occurred over a summer when he attended neither the private Primrose School nor a HCDE facility. Tr. 4636.

174. HCDE refused the parent's offer to help train HCDE personnel on the student's ABA program and protocols. Tr. 4193.

175. As a result of HCDE's refusal to cooperate with the parent's in learning how to interact with the student, the aid assigned to the student's class was less prepared than he could have been. Tr. 4201-03.

176. As of September 7, 2000, the student had become much more vocal and often was attempting to speak. Tr. 3794.

177. The CARD program, while based on LOVAAS style ABA, is not supervised by Dr. Lovaas nor is it a Lovaas replication site. Tr. 4564-66.

178. Judy Bailey, the Associate Director of Professional Support Services with the TEAM Evaluation Center, believes that it would be extraordinary if the Lovaas results are found to apply to a randomly selected population of autistic preschool children. Tr. 4964.

179. Sandra Jerardi reported that five of the thirty five autistic children with whom she had worked and who received the HCDE program reached a level of achievement she termed indistinguishable. Tr. 5253-55.

180. Irise Chapman, the Director of Exceptional Education for HCDE, testified and the court finds as a fact that, if the results reported by Lovaas are valid, a free appropriate public education for autistic children should include such a component. Tr. 6454-55

181. Given the state of knowledge today about autism and its treatment, a well constituted IEP

team must have someone on it who is knowledgeable about Lovaas style ABA and who has an open mind about whether or not to recommend ABA for young. especially preschool, children. Schwartz at Tr. 6902.

182. Dr. Ilene Schwartz. the HCDE expert on interventions for autistic children, testified and the court agrees that. given the state of the evidence today. An intensive ABA program should be a component of the student's educational program. Tr. 6902-04.

183. The student enjoys and benefits educationally from his placement in the regular education class at Westview Elementary School. *Personal observation of the court.*

184. The student benefits from the related service of speech therapy provided by HCDE at the Westview Elementary School. *Personal observation of the court.*

185. The student interacts well with his classmates at Westview Elementary School both in the classroom and at recess. *Personal observation of the court.*

186. The student benefits from his privately funded speech therapy provided at the parents' expense with Anna Davenport. *Personal observation of the court.*

187. The student is more engaged in the learning process in his Lovaas style ABA than in any other activity observed by the court. *Personal observation of the court.*

188. The student was as motivated to speak and demonstrated as much or more ability to speak during his Lovaas style ABA session than he did in either of the two formal speech therapy sessions. *Personal observation of the court.*

189. The student's preferred learning style is one-on-one Lovaas style ABA. *Personal observation of the court supported by several witnesses during the trial.*

190. Intensive one-on-one ABA "needs to be a component of a program [for autistic children]." Schwartz at Tr. 6908.

191. Dr. Ilene Schwartz. the HCDE expert on interventions for autistic children. believes that eighteen hours a week of intensive discreet trial ABA interventions should be a minimum level for a program for an autistic child similar to the student. Tr. At 6923-24.

III. CONCLUSIONS OF LAW

Congress intended for the Individuals with Disabilities Education Act ("IDEA") (20 U.S.C.A.

1400 *et seq.)* to guaranty children with disabilities a free appropriate public education ("FAPE"). *Renner v. Board of Educ.*, 185 F.3d 635, 644 (6th Cir. 1999). In determining whether or not a public school system has offered a disabled child FAPE, a court must first determine whether the school system has complied with the procedures mandated by the IDEA. *See, Board of Educ. V. Rowley,* 458 U.S. 176, 206, 102 S.Ct. 3034, 73 L.Ed.3d 690 (1982). In return for accepting federal monies, the IDEA requires states to identify, locate, and evaluate all disabled children residing in the state who are in need of special education and related services. 20 U.S.C.A. § 1412(2)(C)

School districts receiving federal funding under IDEA must establish an individualized educational plan ("IEP") for each child with a disability. 20 U.S.C.A. § 1414(a)(5). Congress further defined an IEP as a written statement developed by a professional qualified to deliver the specially designed instruction, the child's teacher, and the parents of the child. *See,* 20 U.S.C.A. 1401 § 1401(a)(20).

Placement decisions must be based on the IEP, which must contain a statement of measurable annual goals, including benchmarks or short term objectives. 20 U.S.C.A. § 1400. A legally sufficient IEP must also describe the educational and other services to be provided, and criteria for evaluating the child's progress. *Id.; see also, Knable ex rel. Knable v. Bexley City School Dist.*, 238 F.3d 755, 763 (6th Cir. 2001).

The *Rowley* Court stressed that Congress had emphasized that full participation by concerned parties in the IEP process would, in most cases, ensure that much if not all of what Congress wanted in the way of substantive content would make its way into an IEP. *Rowley,* 458 U.S. at 206. Congress did not, however, define "appropriate education" and instead, left it to the courts and the hearing officers to give content to the requirements of an appropriate education. *Id.* at 458 U.S. 187.

The *Rowley* Court acknowledged the difficulty (if not impossibility) of defining an "appropriate" education for all learning disabled children. For all such children it set a standard requiring all IEPs to provide at least "educational benefit." *Rowley* at 458 U.S. 201-202.

It did, however, define what constituted a FAPE for children capable of functioning academically within the regular education classroom and able to perform on grade level:

> [T]he IEP and, therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

Rowley at 458 U.S. 203-204.

The implementing regulations for IDEA lend further support to the proposition that minimal educational benefit for a child who is capable of much more does not meet IDEA's requirement of a FAPE:

> Specially designed instruction means adapting, as appropriate to the needs of an eligible child... the content, methodology, or delivery of instruction--
>
> (i) To address the unique needs of the child that result from the child's disability;
>
> (ii) To ensure access of the child to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children.... 34 C.F.R. Sec. 300.26(b)(3).

Although technical violations will not automatically invalidate an IEP, this circuit requires administrative law judges and hearing officers to strictly review an IEP for procedural compliance.

Dong v. Board of Educ., 197 F.3rd 793, 800 (6th Cir. 1999); *see also, Doe v. Defendant I,* 898 F.2d 1186, 1190-91 (6th Cir. 1990) and *Burilovich v. Board of Educ. Of Lincoln,* 208 F.3d 560, 567 (6th Cir. 2000). Having assured itself that the process met the requirements of IDEA, a reviewing court or hearing officer must then determine whether the IEP developed by the school system in accordance with the mandated procedures is reasonably calculated to enable the child to receive educational benefits. *Id.* At 206-207. There is no violation of IDEA if the school system has satisfied both requirements. *Rowley* 458 U.S. at 206-207.

Courts are not permitted to substitute their own notions of sound educational policy for those of the school officials. *Thomas v. Cincinnati Bd. Of Educ.*, 918 F.2d 618, 624 (6th Cir. 1990). Instead, courts are to give deference to state and local agencies in choosing the educational methodology *most* suitable to the child's needs. *Rowley* at 458 U.S. 207. Courts should only intervene where a preponderance of the evidence weighs against the local education agency's decision. *Id.* at 206.

Finally, the instant case involves, in part, the parents' request for reimbursement for private placement, and for provision of related services at their own expense. In order for parents to unilaterally alter their child's placement or program and then be entitled to relief under the IDEA, they must establish that the public placement or services offered by the school district violated IDEA and that the private placement or service was proper under the act. *Florence Co. School Dist. Four v. Carter,* 510 U.S. 7, 114 S.Ct. 361, 366, 126 L.Ed.2d 284 (1993); *Wise v. Ohio Dept. Of Educ.*, 80 F.3rd 177, 184 (6th Cir. 1996).

The court will first address the procedural violations alleged by the parents and then take up the substantive allegations.

A. PROCEDURAL VIOLATIONS

Under the first prong of *Rowley*, the Court must first determine whether the HCDE complied with the procedural requirements of the IDEA. The procedural requirements are particularly important because the development and implementation of the IEP are the cornerstones of the IDEA. *Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 592, 597-97, 98 L.Ed.2d 686 (1988). The strict procedural requirements help assure the quality of the resulting IEP.

Under the Act, the IEP must contain a specific statement of the child's current performance levels, the child's short-term and long-term goals, the educational and other services to be provided, and criteria for evaluating the child's progress. 20 U.S.C. § 1401(a)(20). These are requirements by which the adequacy of the IEP is to be judged. *Cleveland Heights-University Heights City School District v. Boss*, 144 F.3d 391 (6th Cir. 1998). Minor technical violations, which do not affect the adequacy of the IEP, may be excused. *Id.*

If the HCDE violated the IDEA's procedural requirements and if those procedural violations caused substantive harm to Z. D., there has been a denial of a FAPE. *See, Metro. Bd. Of Pub. Educ. V. Guest*, 193 F.3d 457, 464-65 (6th Cir. 1999); *Daugherty v. Hamilton County Schools*, 21 F.Supp.2d 765, 772 (E.D.Tenn. 1998). Assuming the court finds a denial of a FAPE, the court may grant such relief as the court determines is appropriate. 20 U.S.C.A. § 1415(e)(2).

The record in this case establishes significant procedural violations of the IEP process as required by the IDEA. Even if the Court were to view the testimony and the evidence in the light most favorable to HCDE, the record clearly establishes that HCDE, in large part because of cost considerations, embraced an unofficial policy of refusing to consider Lovaas style ABA for children who presented with autism as their disabling condition.

The HCDE M-Team personnel consistently went into IEP meetings, where they were legally bound to assess the student's disabilities and individual needs before selecting a methodology, with a predetermination to deny the student's request for a Lovaas style ABA program. In so doing, the HCDE personnel on the M-Team had "pre-selected" the extant HCDE program regardless of the student's demonstrated individual needs. This bias on the part of the HCDE stemmed in large part from concerns about the perceived cost of Lovaas style ABA.

The result was a kind of "virtual" IEP team meeting where the two parties talked past one another rather than cooperating to the student's benefit. The court notes that Mr. and Mrs. D. did request data from HCDE on the HCDE methodology at the meeting where they were first denied the ABA services for the student. The court finds that even had the HCDE produced the data on its success rate with autistic children it would have not changed the outcome. The data produced for the hearing indicate that approximately 14% of autistic children receiving only the HCDE program went on to become "indistinguishable" from the children in regular education classrooms. This does not compare favorably to the 47% rate reported by Dr. Lovaas and apparently being achieved at the replication sites.

The failure of the HCDE to have regular education teachers attend the IEP team meetings is also a troubling procedural violation. The absence of a regular education teacher provides strong evidence that the decision to place the student in a special education classroom for the 1999-2000 school year had been made before the IEP team convened.

The student's parents had every right to expect and were entitled to a full and fair assessment of the student's needs and then an unbiased decision making process within the IEP format to address the student's individual needs. This did not happen in this case and the procedural violations

themselves amount to a denial of FAPE.

II. SUBSTANTIVE VIOLATIONS

Science and innovation have warred with orthodoxy at least since Galileo was forced to recant in the shadow of the rack. In defending its less expensive and more orthodox choice of services for the student, the HCDE cites to the oft quoted *Doe v. Bd. of Educ. of Tullahoma City Schools* where the Sixth Circuit held that schools have complied with the IDEA's requirements if they offer the educational equivalent of a serviceable Chevrolet to a handicapped student rather than a Cadillac.[3] 9 F.3d 455. 459 (6th Cir. 1993). The IDEA may not mandate a Cadillac for Z. D. It does, however, require the HCDE to make sure whichever vehicle they propose, is fully gassed and capable of arriving at an appropriate destination.

The appropriateness of the destination for a particular disabled child is dependent to a large extent on the child's abilities and potential. In reversing a District Court finding that a school system had provided FAPE by providing more than a "trivial" benefit, the Third Circuit noted:

> The [special] education must be tailored to the unique needs of the

[3]The student's situation is clearly distinguishable from the facts in *Doe*. *John Doe* had been a regular student with a full range IQ score of 130. Testing revealed an auditory processing disorder and the parents agreed to allow the school system to develop an IEP for their son after the fall semester had begun and their son had selected his courses. Rather than giving the school the opportunity to develop an appropriate IEP, the parents unilaterally placed him in a private school during the summer recess. The Parents, in contrast to John Doe's parents, fully cooperated with the school system in trying to develop an appropriate IEP.

> disabled student through an [IEP]. IDEA leaves to the courts the task of interpreting "free appropriate education." The Supreme Court began this task in *Board of Education v. Rowley,* holding that while an IEP need not maximize the potential of a disabled student, it must provide "meaningful" access to education and confer "some educational benefit" upon the child for whom it is designed.... In determining quantum of educational benefit necessary to satisfy IDEA, the [Supreme] Court explicitly rejected a bright line rule. Noting that children of different abilities are capable of greatly different achievements, the Court instead adopted an approach that requires a court to consider the potential of the particular disabled student. [The Third Circuit has] rejected the notion that the provision of any educational benefit satisfies IDEA, holding that IDEA "clearly imposed a higher standard." IDEA calls for more than a trivial educational benefit and requires a satisfactory IEP to provide significant learning and confer "meaningful benefit." We also reject the notion that what was "appropriate" could be reduced to a single standard, holding that benefit "must be gauged in relation to the child's potential." When students display considerable intellectual potential IDEA requires "a great deal more than negligible [benefit].

Ridgewood Board of Educ. v. N.E., 172 F.3D 238 (3rd Cir. 1999) (other citations omitted).

A. The school system did not offer a "methodology." The HCDE did not offer to provide Z. D. with a proven or even describable methodology for educating autistic children because they had no such methodology to offer. In pre-hearing discovery and in the first days of the hearing, the HCDE termed their methodology the

"eclectic" methodology or approach. During the course of the hearing, however, the HCDE witnesses distanced themselves from this label when it became clear that it was indefinable and virtually meaningless as a descriptor for an organized methodology. The evidence showed that the HCDE actually cobbled together various components from other methodologies, primarily TEACCH[4]. They did so intuitively based on the experience and preferences of individual IEP team members. When forced to produce historical data to demonstrate the efficacy of these past choices, the HCDE could only claim a best outcome success rate one third that of the reported best outcome children in the Lovaas study group.

If their intuition and experience were telling them that their choices for autistic children were as good as or better than the Lovaas style ABA, they were misleading themselves.

Surprisingly, neither these data comparisons, the reported favorable results from the Lovaas replication sites, nor Dr. Schwartz's testimony that all educational methodologies for autistic children should include one-on-one discreet trial training, moved the HCDE in its opposition to intensive one-on-one discreet trial training. This steadfast resistance to one-one-one ABA in the face

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[4] There are other methodologies available besides Lovaas style ABA and TEACCH. The HCDE's expert, Dr. Ilene Schwartz testified about her own program, DATA, which also employs one-on-one discreet trial training and stresses data collection and analysis for all its components. The HCDE personnel, such as Ann Kennedy and Sandra Jerardi, who should be exploring improved and proven methodologies for educating autistic children demonstrated an appalling lack of interest in the more innovative and undoubtedly more expensive programs.

of the mounting favorable evidence for Lovaas style ABA provided further evidence that the HCDE's insistence on rejecting Lovaas style ABA for the student is based primarily on its perceived cost.

The record, as developed by both the parents' and the school system's witnesses, showed the most widespread methodology, TEACCH, is gradually losing ground in the special education community to more effective methodologies, such as Dr. Schwartz's program, which employ one-on-one ABA as a chief component. There was no evidence whatsoever produced to indicate that intensive one-on-one discreet trial training was somehow *less* effective than more orthodox methodologies. The HCDE also failed to produce convincing evidence that their methodology for young children with autism was equal to or better than a program based primarily on an intensive ABA intervention. The preponderance of the evidence weighed heavily in favor of Lovaas style ABA as the appropriate methodology for educating Z. D.

B. The home based Lovaas style ABA program is a recognized methodology. The parents learned of the Lovaas style ABA program on their own. The court finds this significant because, given its demonstrated effectiveness and the widespread knowledge within the HCDE of its spreading use with autistic children, it is difficult to explain how a school system, which claims to have been open to any methodology which would address the student's unique needs, would dismiss this approach outright without even discussing its perceived advantages and disadvantages with the parents. Given the state of knowledge about methodologies appropriate for educating autistic children, the HCDE school system representatives should have at least informed the parents about the Lovaas style of ABA and explained why they would recommend against it.

Having learned of the Lovaas style ABA methodology on their own and having funded the

initial months of the student's program, the parents were convinced by the student's progress that this was the appropriate methodology for the student. When the parents met with HCDE to develop the student's 1999-2000 IEP, the school system was confronted with the parents' reports of the student's remarkable progress utilizing the Lovaas style ABA with the student as well as Dr. Speraw's letter of October, 1997 recommending an ABA approach for him. It was during this meeting that the HCDE's representative told the parents that there were things she wished she could recommend for the student but then she would have to give them to everybody.

HCDE's refusal to consider Lovaas style ABA for the student for the 1999-2000 school year is even more inexplicable. The student's parents had fought to have 600 goals included in the student's IEP for the previous school year, 1998-99. The HCDE had suggested 78 goals and the parties eventually agreed to include 137 goals on the 1998-99 IEP. When the parties sat down to develop the IEP for 1999-2000, they knew that the primary teaching methodology for the student had been a home based intensive Lovaas style ABA program and that the student had accomplished 99 of the 137 goals on his previous IEP and an additional 130 of the goals HCDE had rejected for his 1998-99 program.

The HCDE had its program in mind when it suggested 78 goals for 1998-99. The student had actually accomplished 229 of the 600 goals his parents had set for him and had clearly succeeded beyond HCDE's expectations for him by accessing CARD's Lovaas style ABA program. There is no case law which stands for the proposition that the term "appropriate" as it pertains to FAPE sanctions a program which would actually retard a special needs child's education or development.

The court finds that an appropriate educational methodology for Z. D. must include an intensive Lovaas style ABA component. The evidence at trial, however, did not demonstrate that a

40-hour per week ABA program is required in order for the student to succeed. In fact, the testimony indicated that the student does best on a 30 hour per week program.

C. Extended school year services are needed. The amount of regression suffered by a child during the summer months, considered together with the time required to recoup lost skills when school resumes in the fall, is an important consideration in assessing an individual disabled child's need for a structured educational program in the summer months. *Johnson v. Independent School Dist. No. 4 of Bixby,* 921 F.2d 1022 (10th Cir. 1990). Demonstrated regression, however, is not the only criterion. The school officials must also consider predictive data based on the opinion of professionals in consultation with the child's parents. *Id.* at p. 1028.

The IDEA's implementing regulations specifically state that:

> A public agency may not use a parent's refusal to consent to one service or activity... to deny the parent or child any other service, benefit, or activity of the public agency....

34 C.F.R. Sec. 300.505(3)(e).

The HCDE apparently believed the student might suffer regression when they approved extended school year ("ESY") services for him in 1998. There is no evidence in the record whatsoever to indicate that this threat of regression has abated. Why then has the HCDE steadfastly denied ESY services to the student since the summer of 1999?

The HCDE personnel testified that the denial was because there was no program to extend. In denying ESY related speech therapy services for the summer of 1999, Ms. Dixon noted that any *lack of progress* on the student's part was due to his not having accessed the full HCDE program. His classroom teacher, Ms. Wiessen, tried to justify the denial on the basis that she could not document regression and the fact that he *was making progress* accessing HCDE services on a part-

time basis.

The expert and fact witness testimony in this case was unequivocally consistent: Z. D. would have regressed without summer services. The threat of regression did not change between the summer of 1998 and the summer of 1999. What changed was the relationship between the parents and the HCDE once the dispute began over the student's need for Lovaas style ABA. The school system had no quibble with related speech therapy during the summer of 1998 when the student's parents were paying for his ABA program. The problems arose when the parents asked the HCDE to fund not only related services during the summer of 1999 and 2000, but, when they demanded that the school system also fund a Lovaas style ABA program for him.

Summer services, like services during the regular school year, are intended to address the child's needs. The concept is even labeled "extended school year" not "extended school program." A summer IEP, like any other IEP, should address the individual and unique needs of the eligible child. The HCDE is in error when it maintains that the purpose of ESY is to continue an existing IEP and that, if there is no agreed upon IEP, there is nothing to continue. The purpose of ESY, like the rest of the IDEA and its implementing regulations, is to educate disabled children. The need for and design of an ESY program begins with an assessment of the child's needs, not the level of cooperation between the school system and the child's parents.

III. REIMBURSEMENT

The IDEA's grant of equitable authority empowers an administrative law judge or hearing officer to order school authorities to reimburse parents for their expenditures on private special education for a child if the administrative law judge or hearing officer determines that such placement, rather than a proposed IEP, is proper under the Act. *School Comm. of Burlington v.*

Department of Ed. Of Mass., 471 U.S. 359, 369, 102 S.Ct. 1996, 2002, 85 L.Ed.2d 385 (1985). Congress intended that disabled children's needs would be met either in public or private institutions through cooperation between the parents and school officials within the IEP process. *Florence County School Dist. Four v. Carter*, 510 U.S. 7, 12, 114 S.Ct. 361, 364, 126 L.Ed.2d 284 (1993).

In cases where cooperation fails, however:

> [P]arents who disagree with the proposed IEP are faced with a choice: go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement. For parents willing and able to make the latter choice, it would be an empty victory to have a court tell them several years later that they were right but these expenditures could not in a proper case be reimbursed by the school officials. Because such a result would be contrary to IDEA's guarantee of a "free appropriate public education" we [hold] that Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case.

Florence County School Dist. Four v. Carter, at 510 U.S. 12, *quoting, School Comm. of Burlington v. Department of Ed. Of Mass., supra.*

Parents who make this choice do so, however, at their own financial risk. *Id.* at 471 U.S. at 374. The parents took a considerable financial risk when they embarked upon the student's home based ABA program. Early on in their dispute with the HCDE they asked for outcome data to support the program HCDE was offering the student. None were produced until this hearing and the ones that were produced offer little comfort to a parent of a child, who falls on the autism spectrum where the student falls. Experts on both sides testified that selecting the wrong methodology for an autistic child can mean the difference between an independent adult life and a lifetime of dependency

and support.

The parents made a correct and legally defensible choice when, in the face of the school systems unbending intransigence, they opted to continue the successful ABA program the student had been receiving. The parent's are entitled to reimbursement for some, but not all, of their expenses in providing direct and related educational services for their son. The court will address reimbursement issue by issue within this order.

IV. THE SPECIFIC ALLEGED VIOLATIONS

The court has already addressed the major issues in the case and the facts and law surrounding each issue. Some of the many violations alleged by the parents were either disposed of by interlocutory orders of the court or by agreement of the parties during the hearing. We now turn to the specific alleged violations remaining for adjudication.

COUNT 1. *The county failed to timely and properly evaluate the student's individual needs requiring the parents to obtain the evaluations at their own expense.*

The record supports a finding that any alleged delays in evaluating the student for occupational services were excusable given the information supplied to the school system by the parents and the student's levels of performance in that area. Exs. 16, 17, 21. In addition, the parents had already obtained a private occupational therapy evaluation, which did not recommend any one on one occupational therapy. Ex. 298. Furthermore, the parents and the HCDE worked together to accomplish a series of evaluations, some of which were delayed because of difficulty obtaining a neurological evaluation. Finally, there is little evidence of any significant adverse impact on the student from these alleged delays. The court therefore **DENIES** the parents' request for reimbursement for evaluations.

2. *Even though it was the student's proven learning style, the county refused to consider any one-on-one ABA therapy.* The court has already addressed this issue at length.

The student's parents presented detailed evidence documenting the fact that the student had already made remarkable progress in the CARD program when they first asked the HCDE to consider it for the student's summer 1999 program. The court **FINDS** that on a procedural basis the HCDE's refusal to even *consider* Lovaas style ABA for the student during this and subsequent IEP meetings denied Z D. a FAPE. The court also **FINDS** that even had the HCDE given full and fair consideration to the student's proven learning style, denying the student Lovaas style ABA at the point in which it was requested would have been a substantive denial of FAPE. Accordingly, the court **FINDS** that a free appropriate public education for Z. D. should have included at least 30 hours of intensive Lovaas style ABA and must include at least the same level of ABA instruction until such time as there is demonstrable evidence, including present levels of performance and expert opinion by proponents of the Lovaas approach, that the intensity level should be reduced or eliminated. The court **ORDERS** the HCDE to reimburse the student's parents for the weekly costs of his home based ABA program up to and including thirty hours of service for each week he received such services after May 11, 1998. This requirement remains in effect until such time as the HCDE has convened a properly constituted IEP team, which shall include at least one expert in and advocate for Lovaas style ABA, and produced an IEP for Z. D., which shall include at least 30 hours of Lovaas style ABA for the student per week to be provided either at home or in a suitable, non-distracting environment in his assigned school.

COUNT 3. *The goals and objectives proposed by the county are uniformly vague and are not objectively measurable to be able to ascertain progress. The goals and*

objectives proposed by the parents were watered down to fit the county's administrative needs, i.e. to fit the existing classrooms the county has available rather than to fit the student's individual needs.

The HCDE witnesses testified that they had been criticized by state auditors for putting too many goals on an IEP. There is no legal support for assigning an arbitrary limit to the appropriate number of goals for the student. Because the real issue was between the detailed goals and objectives that were part of his ABA program and the more general goals traditionally used by the HCDE, this issue should resolve itself with the inclusion of Lovaas style ABA in his IEP's. The county's resistance to goals based on the number of them is further evidence. however, of procedural violations in the IEP process.

COUNT 4. *The county failed to offer the student a full continuum of options and what few prepackaged options have been presented are "offered" by the county on a take it or leave it basis.*

This issue is subsumed in and has been addressed in other counts.

COUNT 5. *Did the county fail to provide the student with meaningful and appropriate opportunities for inclusion to the maximum extent appropriate.*

Congress intended that disabled students be educated in the least restrictive environment. The IDEA explicitly requires:

> To the maximum extent appropriate, children with disabilities, including children in public and private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such

that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C.A. §1412(a)(5)(A).

The parents agreed to the placement in the 1997-98 school year and in fact wanted Lisa Steele as the student's teacher. The real contention arose for the 1998-99 school year when the parents wanted significantly more inclusion for the student with typically developing peers. The HCDE did not discuss options that would have provided more exposure with typically developing peers with the parents and the record indicates a policy of indifference to this legal requirement. At this point, however, there is no remedy for the student having missed opportunities to interact with typically developing peers in the 1998-99 school year.

By the time of the August. 1999, IEP meeting, however, there was no evidence that the student could not tolerate and benefit from significant exposure and interaction with typically developing peers. The fifteen minutes three times a week of inclusion offered as a starting point by the HCDE for the 1999-2000 school year appeared to be based on a policy of starting at the low end of the scale and working up. Ex. 265. The stated goal in the IEP discussion of perhaps reaching an hour a day of inclusion by the end of the year further supports evidence of a policy of gradualism.

The law clearly requires the school system to educate the student with typically developing peers to the maximum extent possible. The HCDE did not develop his 1999-2000 IEP with this in mind. It offered, basically, a year of education in a CDC classroom where every single child was disabled.

The parents unilaterally removed the student from the HCDE system and placed him in a regular education 4-K class at the private Primrose School. The court reviewed video tapes of the student at the Primrose School and, notwithstanding the quibbles and hyper-criticism of the tapes by HCDE witnesses, found the student to be well integrated into his class and learning to interact with his regular education classmates. His classmates had obviously accepted him and everyone seemed to benefit from having the student in the classroom.

The benefits of the Primrose School experience were even more apparent when the court visited the student at the HCDE Westview Elementary School at the conclusion of this hearing. His level of participation and involvement had continued to increase to the mutual benefit of all the children in his class.

That said, the parents are not entitled to reimbursement for the costs of the Primrose School. The parents removed the student without giving the HCDE the required statutory notice. 20 U.S.C.A. § 1412(a)(10)(C)(ii). There is no way of knowing whether or not the HCDE would have modified the inclusion component of the student's IEP in the face of the parent's decision to place him in a private school. Having denied the HCDE the opportunity to modify that part of the IEP, the parents are not now entitled to reimbursement. The claim for reimbursement for the cost of the Primrose School is **DENIED**.

COUNT 6. *The county failed to even provide services it expressly agreed to provide to the student and the county used certain service providers without the appropriate knowledge of, expertise in, and experience with the student's educational needs.*

The HCDE's performance in evaluating the student for and providing related services in occupational therapy and speech therapy is disappointing. For the 1997-1998 school year some of

the HCDE records have apparently been lost in a move. However, the testimony at trial and the records that do exist, indicate that while some speech therapy was provided, it was neither in the amounts required by the IEP nor was it always the one-on-one speech therapy the parents had a right to expect. Exs. 29. 35, 37. 51. Tr. 2217.

The occupational therapy agreed to for the 1998-99 school year was to have been for one hour every other week. Ex. 105. The record shows that the student received only five thirty-minute sessions between October 15, 1998 and the end of the school year. Exs. 206. 265.

Speech therapy for 1998-99 was to have been one-on-one twice a week for thirty minutes and group therapy each day. The record at trial showed that these services did not actually begin until over four months into the school year. Exs. 289, 454, 453. 150, 181. The HCDE again agreed to provide occupational therapy. physical therapy. and speech therapy for the student for the 1999-2000 school year. Exs. 260, , 265, 270. The HCDE then withdrew its agreement to provide the services because the parents refused to accept the entire IEP the HCDE offered. The court has already held that the IEP produced by HCDE for the 1999-2000 school year was both procedurally and substantively defective and denied Z. D. a FAPE. As the IEP denied FAPE. the parents were under no obligation to accept it in its entirety. The court **FINDS** that the HCDE mishandled its obligation to provide the related services of physical therapy, occupational therapy, and speech therapy to the student. The court **ORDERS** the HCDE to reimburse the student's parents for any out of pocket costs they have incurred in providing any such related services for the student. This includes services currently being provided and extends until such time as a properly constituted IEP team produces an IEP, which conforms to this order. The court finds, however, that the HCDE is not responsible for reimbursing the parents for the costs of the following examinations/evaluations: (1)

the neurological evaluation by Dr. Miller, which was in the nature of a medical examination and not part of the IEP process, (2) the speech and hearing evaluation of February 4, 1997 which was done before the student's third birthday. (3) The October 2, 1999, occupational therapy evaluation by Karan Wilson, for which the parents had never asked for reimbursement. The report by Dr. Mulick dated June 2, 1999 is in the nature of costs for this hearing and should be addressed in that forum.

COUNT 7. *Are the student's parents entitled to reimbursement for the cost of the student's tuition and related expenses for attendance at the Primrose School in the 1999-2000 school year and for the costs of related services including ABA therapy from July, 1997 through May 31, 2001?*

This issue has already been addressed in findings related to other counts.

COUNT 8. *The county failed to provide ESY services for 1999 and 2000.*

This issue has already been addressed by the court.

COUNT 9. *Does the IEP of August 11, 2000 offer a free appropriate public education to the student, subject to the addition of assistive technology goals and objectives, and, if not, is petitioner entitled to reimbursement for the cost of one-on-one applied behavior analysis services and one-on-one occupational therapy services that the parents have purchased and continue to purchase during the 2000-2001 school year?*

This count as already been addressed by the court.

COUNT 10. *Do petitioner's parents have the right to select or veto the selection of providers of special education and related services by HCDE as the public agency responsible for implementation of the petitioner's IEPs?*

The parents have no right to veto competent providers of services called for in a properly constituted IEP.

COUNT 11. *To what extent must HCDE allow the participation of petitioner in the public education program offered by HCDE under the circumstances that his parents are unwilling to accept the entire IEP of August 11, 2000?*

This count has already been addressed by the court.

The court **FINDS** that Z. D. is the prevailing party.

This decision is binding on both parties unless the decision is appealed. Any party aggrieved by this decision may appeal to the Chancery Court for Davidson County, Tennessee, or may seek review in the United States District Court for the district in which the school system is located. Such appeal or review must be sought within sixty days of entry of a final order in a non-reimbursement case or three years in cases involving educational cost and expenses. In appropriate cases the reviewing court may stay this final order.

IT IS SO ORDERED THIS 20th DAY OF AUGUST, 2001.

A. JAMES ANDREWS
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing FINAL ORDER has been sent be first class mail this 20th day of August, 2001 to the following:

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